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**STATE OF WISCONSIN  
Division of Hearings and Appeals**

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

MGE/167471

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**PRELIMINARY RECITALS**

Pursuant to a petition filed July 22, 2015, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Waukesha County Health and Human Services in regard to Medical Assistance, a hearing was held on August 19, 2015, at Waukesha, Wisconsin.

The issue for determination is whether [REDACTED], a Community Based Residential Facility (CBRF), is considered a "medical institution" for Medicaid purposes.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]

Petitioner's Representative:

[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703

By: Nicholas Kusch

Waukesha County Health and Human Services  
514 Riverview Avenue  
Waukesha, WI 53188

ADMINISTRATIVE LAW JUDGE:

Corinne Balter

Division of Hearings and Appeals

**FINDINGS OF FACT**

1. The petitioner (CARES # [REDACTED]) is a resident of Waukesha County.
2. The petitioner moved to [REDACTED], a memory care facility in Waukesha on May 18, 2011. This facility is licensed as a community-based residential facility (CBRF). It is designed for

patients with Alzheimer's or Dementia. The family private paid for the petitioner's care at [REDACTED]. The room and board charges were approximately \$4,660.00 per month.

3. On June 29, 2011 the petitioner moved to [REDACTED]. [REDACTED] is another CBRF.
4. On July 10, 2014 the petitioner entered [REDACTED].
5. The petitioner has a Community Spouse.
6. The petitioner never made a request for a Waivers Program.
7. On April 21, 2015 the petitioner applied for Institutional Medicaid. He requested coverage effective March 1, 2015.
8. In determining the petitioner's eligibility, the agency used an asset assessment date of July 10, 2014. This is when the petitioner entered [REDACTED]. The asset limit for the couple using this July 10, 2014 date was \$59,426.16. Based upon this asset assessment date and limit, the County determined that the petitioner was eligible for institutional MA coverage effective May 1, 2015.
9. Had the county used an asset assessment date of May 18, 2011, when the petitioner entered [REDACTED] CBRF, the petitioner's asset limit would be significantly higher, and he would have been eligible for institutional MA coverage effective March 1, 2015.
10. The petitioner appealed. The Division of Hearings and Appeals received two requests for fair hearings. The first request was received on June 22, 2015. The second was received July 23, 2015. Both requests sought to address the transaction of events listed above.

### DISCUSSION

When determining whether an institutionalized spouse is eligible for MA, county agencies are required to review the combined assets of the institutionalized spouse and the community spouse. MA Handbook, Appendix 18.4.1. All available assets owned by the couple are to be considered. *Id.* Homestead property, one vehicle, and anything set aside for burial are exempt from the determination. *Id.* The couple's total non-exempt assets then are compared to an "asset allowance" to determine eligibility. *Id.*

The Community spouse's asset allowance is as follows: \$119,220 if the total countable assets for the couple are \$238,444 or more, half of the couple's total countable assets if the total countable assets are between \$100,000 and \$238,440, and \$50,000 if the couple's total countable assets are \$100,000 or less. MA Handbook, Appendix 18.4.3. It follows that the greater the couple's countable assets, the greater the asset share of the community spouse. *Id.*

The date of this asset assessment is either the date of the institutionalized spouse's first institutionalization of 30 days or more or the date the institutionalized spouse first requested Home and Community Based Waivers, whichever is earlier. MA Handbook, Appendix 18.4.2.

In this case the petitioner never requested Home and Community Based Waiver coverage. Had the petitioner requested this coverage, he could have had an earlier asset assessment date, however, this coverage was never requested. Thus, the petitioner's asset assessment date is the date the petitioner was first institutionalized.

The petitioner argues that the date he first entered [REDACTED], a CBRF designed to care for Alzheimer's patients, is the date he was first institutionalized. The County argues that a CBRF is not a medical institution. They argue that the petitioner was not institutionalized until he entered [REDACTED] on July 10, 2014.

The issue then becomes whether [REDACTED], a CBRF, is an institution for the purposes of Medicaid eligibility. The state policy definition states that an “‘institutionalized person’ means someone who []participates in Community Waivers, or has resided in a medical institution for 30 or more consecutive days.” MA Handbook § 18.2.3. “For Medicaid purposes, “institution” means medical institution. A medical institution can be, but is not limited to, skilled nursing facilities (SNF), intermediate care facilities (ICF), institutions for mental disease (IMD), and hospitals.” MA Handbook § 27.1.1.

Medical institution means a facility that:

1. Is organized to provide medical care, including nursing and convalescent care,
2. Has the necessary professional personnel, equipment, and facilities to manage the medical, nursing, and other health needs of patients on a continuing basis in accordance with accepted standards,
3. Is authorized under State law to provide medical care, and,
4. Is staffed by professional personnel who are responsible to the institution for professional medical and nursing services.

This aligns with the state spousal impoverishment statute, which defines an “institutionalized person” as follows:

(d) “Institutionalized spouse” means either an individual who is in a medical institution or nursing facility and is married to an individual who is not in a medical institution or nursing facility or an individual who receives services under a waiver under 42 USC 1396n(c) or (d) and is married to an individual who is not in a medical institution or nursing facility and does not receive services under a waiver under 42 USC 1396n(c) or (d).

Wis. Stat. § 49.455(d). See also the matching federal law definition at 42 USC § 1396r-5(h)(1).

Wisconsin policies must follow the federal rules and regulations on Medicaid eligibility and coverage. The federal rules dictate that “in Medicaid coverage, institutional services refer to specific benefits authorized in the Social Security Act. These are hospital services, Intermediate Care Facilities for People with Intellectual disability (ICF/ID), Nursing Facility (NF), Preadmission Screening & Resident Review (PASRR), Inpatient Psychiatric Services for Individuals Under Age 21, and Services for individuals age 65 or older in an institution for mental diseases. Institutional benefits share the following characteristics:

- Institutions are residential facilities, and assume total care of the individuals who are admitted.
- The comprehensive care includes room and board. Other Medicaid services are specifically prohibited from including room and board.
- The comprehensive service is billed and reimbursed as a single bundled payment.
- Institutions must be licensed and certified by the state, according to federal standards.
- Institutions are subject to survey at regular intervals to maintain their certification and license to operate.
- Eligibility for Medicaid may be figured differently for residents of an institution, and therefore access to Medicaid services for some individuals may be tied to need for institutional level of care.

See, <http://www.medicaid.gov/medicaid-chip-program-information/by-topics/long-term-services-and-supports/long-term-services-and-supports.html>. Thus, a medical institution in this context is a hospital, or

nursing home that provides comprehensive care. *Id.* The facility's comprehensive charge – including room and board – is thus paid by Medicaid. Room and board charges cannot be paid by MA for a CBRF.

The federal statute defines a “nursing facility” as a facility that provides “skilled nursing” (another term of art) or rehabilitation services, and then lists an exhaustive list of performance standards for such a facility. 42 USC § 1396r(a). [REDACTED] is not licensed as a nursing home in Wisconsin, and therefore it does not meet the definition of a nursing facility.

It is important for one to look at the differences between the Community Waiver programs and Institutionalization. The whole point of the Community Waivers program is to allow people who would otherwise be institutionalized to remain in the community. People do this by qualifying for home-based services to allow them to reside in their homes or placement at CBRFs, which are community based facilities. The CBRFs are considered an alternative to institutionalization. This is further support that a CBRF is not considered an institution, and the petitioner would not be considered to have been institutionalized when living at a CBRF. I note that my conclusion is consistent with a previous fair hearing decision addressing this same issue. See MGE/[REDACTED].

I understand that this family has private paid for the petitioner's care for a number of years. This has depleted a significant portion of the family's assets. The petitioner makes the implicit argument that equitably I should decide in his favor given the length of time the family private paid for his care. I note that as an ALJ I do not have equitable power. In addition, even if I had equitable power, if I am to follow the law, there is no way to rule in the petitioner's favor.

### **CONCLUSIONS OF LAW**

The County correctly determined that [REDACTED], a Community Based Residential Facility (CBRF), is not a “medical institution” for Medicaid purposes.

**THEREFORE, it is**

**ORDERED**

That the petition is dismissed.

### **REQUEST FOR A REHEARING**

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in

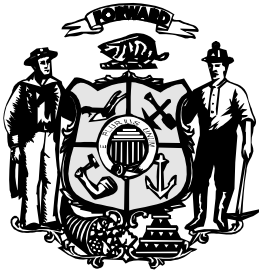
this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 15th day of September, 2015

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\sCorinne Balter  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on September 15, 2015.

Waukesha County Health and Human Services  
Division of Health Care Access and Accountability  
Attorney Dayna Lefebvre